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No. 82-6840

IN THE

Supreme Court Of The United States

October Term, 1983

MICHAEL P. JAMES, - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY - Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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Petition for Certiorari Filed May 27, 1983
Certiorari Granted October 17, 1983

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QUESTION PRESENTED

Whether the Supreme Court of Kentucky Correctly Concluded That, While a No Inference Instruction Is Required To Be Given When Requested, Pursuant to *Carter* v. *Kentucky*, the Privilege Against Compulsory Self-Incrimination Does Not Mandate the Granting of an Unexplained Alternative Defense Request in the Form of an Admonition to the Jury Where Such a Request Conflicts With Established State Practice and Procedure.

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IN THE

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MICHAEL P. JAMES, - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION BELOW

Respondent respectfully corrects petitioner's statement that the opinion of the Kentucky Supreme Court "is not to be published." The published opinion may be found at: *James* v. *Commonwealth,* 647 S. W. 2d 794 (Ky. 1983).

JURISDICTION

Respondent accepts petitioner's statement of the jurisdictional facts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks relief before this Court under the Fifth and Fourteenth Amendments to the United States Constitution and accurately sets forth the relevant provisions.

COUNTERSTATEMENT OF THE CASE

On April 23, 1981, the female victim returned to her City of Frankfort, Kentucky, home from a university

night class and found her front porch light unscrewed and her front door, which was always locked, inexplicably ajar (Joint Appendix [hereinafter "JA"] 30-31, 40). Examination of her apartment revealed her bed pillows "messed up" and that the .22 caliber pistol she kept there was missing (JA 30-31). Early the next morning she obtained the serial number of the gun and reported the burglary (JA 30-31, 40). Investigating officers found evidence of possible entry through a front porch window (JA 40). Soon thereafter, Michael James, and his wife, who were next-door neighbors, observed the victim nailing her windows shut and inquired about the incident (JA 42-43).

On May 1, 1981, the victim came home from work and discovered the lower glass panel of her locked kitchen storm door had been removed and a small pane broken out of the back door to gain entry (JA 31-32). Again the pillows of her bed were messed up but nothing apparently taken this time. (*Id.*) She immediately told a neighbor who called the police (JA 32). City of Frankfort Officer Clark found the storm door panel in some bushes beneath the porch (JA 31, 51). One latent print on the inside of the glass panel was subsequently identified as petitioner's by twenty-six positive comparison points (JA 51, 52; 76-77).

On May 6, 1981, the victim came home for lunch and was about to return to work around 12:30 p.m. when petitioner Michael James knocked at the door and asked to call a doctor for his ill wife (JA 32). Although the victim barely knew James, he and his wife had used her phone on a few occasions during the past

several months and she thought nothing of the request (JA 32, 42-43). As she dialed the number, James grabbed her mouth, poked a gun in her side, and threatened to kill her if she did not follow instructions (JA 32). While attempting to push hard to close the front door with his other hand, James accidentally fired his gun and became angry (JA 33). During the subsequent investigation police officers found what appeared to be a .22 caliber bullet on the floor near the door and a slash mark where it apparently hit the wall (JA 59, Transcript of Trial [hereinafter "T"] Vol. III, 46).

James took his victim into the bedroom where he bound her hands with a strip of cloth and gagged her mouth with a similar strip having a knot already tied in it (JA 33). He leaned her across the bed, covered her head with bed linens and then proceeded to walk about the house and search through her purse. (*Id.*) After a time he stood her up, pulled the hood of her sweater over her head and, after checking to make sure no one was watching, took her across a yard to his apartment in a nearby building (JA 33-34). The victim was reminded she would be killed if she tried anything. (*Id.*) After ensuring they were not seen, he took her to the bedroom, ordered her to undress and to climb on the towel he had placed on the bed (JA 34). She testified she was afraid to make any physical resistance to his advances (JA 35, 36). After raping her, James sat on the bed for a long time and would not allow her to dress. (*Id.*) Subsequently, he permitted her to get

dressed but then told her to go in the bathroom and wash (JA 34-35).

James seemed unable to decide what to do with her and sat in the bedroom for a long time and then in the living room where she was told to sit in the middle of the floor. (*Id.*) At one point he mentioned putting her in the attic (JA 35). Throughout the afternoon the victim promised to tell no one and kept suggesting reasons he should let her go before anyone came home (JA 35-36). She also said she could not explain to her father if the second gun he purchased for her was missing from her purse. (*Id.*) Late that afternoon James was finally persuaded to return her purse and gun and let her go (JA 35). Her supervisor, Mr. Adams, testified she returned to work between 4:30 and 5:00 p.m. and was visibly upset (JA 80-81). After calming her down a bit and learning of the incident, Mr. Adams urged her to call the police, but the victim explained petitioner said he would kill her if she told anyone and that reporting the robbery (sic) had not done any good (JA 36, 80-81). Adams continued to urge her to go to the hospital and to report the crime to the state police (JA 81).

She left work and went to a girlfriend's and then to a friend who called the police at approximately 6:00 p.m. (JA 36, 60-61, 71). Following the police interview during which she gave them James' description, his first name (the only name she knew) and approximate address, the victim was taken to the hospital for examination and tests (JA 36, 54, 71-72; T. Vol. I, 28). Subsequent lab analysis revealed semen

on the vaginal swabs, vaginal smear, a tampon, and her panties (JA 79).

Petitioner's last name and exact address were obtained through fire department records of a recent fire and an arrest warrant was obtained (JA 71-72). At his residence, James' wife said he was refereeing a basketball game at Kentucky State University; therefore, four officers proceeded to the University gym where they found an intramural game in progress and recognized James by his height, 6 feet 11 inches (JA 55, 72; T. Vol. I, 28; Vol. III, 53). When the game concluded in a few minutes, James picked up a gym bag from the bleachers and began to leave (JA 55, 72; T. Vol. III, 53). He was stopped at the door and placed under arrest, the gym bag being taken from him at the time (JA 55-56, 72). The bag was placed in the front seat of the police cruiser and James in the back (JA 56, 63). At that time and when questioned later, James repeatedly denied knowledge or ownership of the gym bag and said it was handed to him by someone (JA 75; T. Vol. I, 30; T. Vol. III, 57). He declined to consent to a search of his residence and was transported to headquarters while a search warrant was obtained for his apartment (JA 56-57, 73). During the execution of the search, State Trooper Sparks and Detective Courtney, City of Frankfort Police Department, returned to the cruiser for additional evidence bags (JA 57). Reaching for evidence bags under the gym bag, which remained on the front seat, Trooper Sparks felt what seemed through the canvas of the gym bag to be a gun. (*Id.*) He took the gym

bag inside where it was found to contain the victim's .22 caliber pistol reported stolen on April 23, 1981, and two cloth strips, one with a knot in it (JA 57-58, 74).

Analysis of the cloth strips revealed saliva of a blood Group A secreter in the knot and a blood test disclosed the victim was a Group A secreter (JA 77-78). Petitioner was found to have Group B blood (T. Vol. III, 11). A towel from James' bathroom contained semen, but in all instances the quantities of semen were too limited to determine blood type (JA 78).

James was subsequently indicted for the May 1, 1981, burglary, KRS 511.030, for the May 6, 1981 rape, KRS 510.040, and for a misdemeanor of receiving stolen property arising from his possession of the recently stolen gun, KRS 514.110 (JA 3). He was also charged as a first degree persistent felon, KRS 532.080, based on his 1972 Nebraska forgery conviction for which he received a two-year probated sentence and his 1973 Virginia murder conviction from which he was on active parole (JA 4, 14, 17).

The case was tried by jury January 18, 1982. During a pretrial motion the prosecutor requested and received permission to impeach James based on his 1972 forgery conviction, should James choose to testify (JA 17). The prosecutor acknowledged the murder conviction could not be mentioned until the second stage of the bifurcated proceedings which follow a jury determination of guilt on the primary offenses (*Id.*). The voir dire examination of prospective jurors was conducted by counsel. The prosecutor included in his

inquiry questions as to the prospective jurors' understanding of the presumption of innocence and burden of proof.[1] Defense counsel included in his inquiry questions concerning prior jury experience; relationships to law enforcement personnel; knowledge of the participants in the case; and attitudes concerning sex crimes, womanhood and community crime (JA 19-29). The possible impact of a person's mistake in the past was explored with one juror who responded a single past mistake would not pose a problem or "get in my way." (JA 27). The jurors were again reminded that Mike James is presumed to be innocent and were questioned in greater detail concerning this presumption and the prosecution's burden to prove guilt beyond a reasonable doubt (JA 27-28). The jurors promised to listen to all evidence presented from the witness stand and to give it equal consideration (JA 29). One juror was asked if the defendant's failure to testify would create any inference as to guilt or innocence and he responded "No, sir." Defense counsel continued by asking if the juror could still afford the defendant his presumption of innocence and consider all evidence presented from the witness stand, to which the juror responded affirmatively (JA 29). Upon repetition of this question to the panel at large, the trial judge noted that the jurors said they would try the case solely upon the law and the evidence which excludes other consid-

[1]The venire were asked by the prosecutor: "Do you understand that under the law in this state that the defendant is presumed innocent until proven guilty beyond a reasonable doubt? You understand that's the law? Will you grant to this defendant that presumption if you sit in this case " (JA 18.)

erations (JA 29-30). Defense counsel announced he had concluded his voir dire examination (JA 30). The court then advised the jury as follows:

> "Ladies and gentlemen, let me simply add to what counsel have already said to you. Any defendant in any case is entitled to the presumption of innocence unless and until he is proven guilty beyond a reasonable doubt by credible, believable, competent evidence produced by the Commonwealth. The indictment of the defendant is not to be considered by the jury as evidence of guilt. It is simply an accusation made by the Grand Jury based on evidence presented to the Grand Jury by the Commonwealth and without evidence presented on behalf of the defendant." (T. Vol. II, 49).

The case proceeded with presentation of the Commonwealth's evidence described above. Defense counsel in his opening statement diagrammed the location of the apartment at the scene and summarized the evidence to be presented by two defense witnesses who testified as follows.

Marion Bates testified that he is retired and spends most of his time around the front porch or front of his residence at 266 East Main[2] (JA 85, 89). He recalled that, beginning around noon on May 6, 1981, he was in the driveway by his house using putty to plug a leak in his automobile windshield (JA 85-86). During this time a good friend and owner of the building at 268 East Main, Chuck Lambert, stopped by and invited

[2]Previous testimony established the victim's address as 270 East Main, Frankfort, Kentucky (JA 30) and petitioner's address as 268 East Main, Frankfort, Kentucky (JA 71-72).

Mr. Bates to see recent improvements to the basement of that building (JA 86-87). While they were in the basement beneath James' apartment, Mr. Bates heard no sounds other than James' record player (JA 88). When Mr. Lambert mentioned needing to be back at work at 1:00 p.m., they left the basement and Mr. Bates continued his work on the car (*Id.*). He could not recall how long he stayed outside that day cleaning out the car and "doing other things" but mentioned he often stayed out until 4:00 p.m. (JA 89). He recalled seeing James leave his apartment around 2:00 p.m. and walk in the direction of Kentucky State University (JA 88). James "hollered" a greeting to Mr. Bates as he customarily did (JA 88-89). Mr. Bates also recalled Mrs. James coming home while Bates was outside and stopping at his house to visit her friends, Dorothy and Annette, and/or to use the telephone (JA 90). Mr. Bates mentioned she often stopped by for these reasons. (*Id.*). He also testified he did not see James return nor did he see James and the victim walk between their buildings (JA 90-91).

On cross-examination Mr. Bates could not recall the day or month he was contacted by defense counsel concerning this case but thought it was four or five months ago (JA 91). He described the distance between James' and the victim's apartment as "short" and estimated walking time for that distance at "about a minute, I guess." (JA 92.) On redirect he responded he would have seen James on that date if James "walked from his -ouse (sic) down to his apartment" in the presence of a lady (JA 93).

Chuck Lambert testified he owned the rental property at 268 East Main and was in the process of slowly cleaning it up (JA 93). He and Mr. Bates "kind of had a daily relationship while [Lambert] was doing the work on the property." (JA 94). When asked if he recalled showing Mr. Bates the property on May 6, Mr. Lambert responded, "I don't recall showing the property to Mr. Bates on that particular date; but I've shown the property to Mr. Bates on many occasions." (JA 95.) He also said, ". . . if Mr. Bates said I showed him the property on that date then he would be correct." (*Id.*)

At this point in the trial the jury recessed for lunch (T. Vol. IV, 47). Upon their return, the following exchange occurred:

> "Judge Meigs: Ladies and gentlemen, I remind you once again of the admonition given before the recess and unless you indicate otherwise, I will assume that you have not discussed the case among yourselves nor allowed anyone to discuss it with you during the recess. Does the Commonwealth waive the call?
>
> Mr. Corns: We do, Your Honor.
>
> Judge Meigs: Does the defendant waive the call?
>
> Mr. Peale: We do, Your Honor.
>
> Judge Meigs: Call your witness. You have closed, I am sorry.
>
> Mr. Peale: We have closed and has a matter in regard to the instructions.

Off the Record

Mr. Peale: Note that the defendant objects to several of the instructions being given to the jury.

Judge Meigs: Overruled.

Mr. Peale: The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled.

Judge Meigs: Ladies and gentlemen of the jury, these are your instructions as to the law applicable to the facts which you have heard from the witness stand in the course of this trial. . . ." (JA 95; T. Red. Vol., 3-4.)

The jury was then instructed for each offense:

"You will find the defendant, Michael P. James, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:" [elements of offense followed] (JA 5-6).

They were further instructed:

"The law presumes a defendant to be innocent of a crime, and the indictment or warrant shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty." (JA 6).

In his closing statement defense counsel reminded the jurors of the presumption of innocence which they

promised to afford James and the prosecution's burden of proving the case beyond a reasonable doubt (JA 96). He then turned to the instructions on each offense and argued, with respect to the burglary, "There is no evidence that Mr. James entered that house" (*Id.*). He dismissed the fingerprint on the inside of the storm door by arguing it could have been there for any length of time and further noted there were no fingerprints on the outside of the door (*Id.*) James' counsel turned to the rape charge and noted that no one saw them crossing the yard, despite the noon hour on a busy street and despite Mr. Bates' presence in the area (JA 97-98). He questioned why James would ask to use the victim's phone when Mr. Bates' phone was used often (JA 98). He further questioned why Mr. Bates did not see them leave even if he happened to miss their entry while he was in the basement (JA 98). The victim's upset demeanor upon reporting back to work was attributed to a fear of her authoritarian supervisor (JA 99). The victim's version of events was characterized as a "story" told for unknown reasons (JA 99). The victim's delay for an hour or so in reporting the crime was also questioned (JA 100). Defense counsel questioned why no blood sample was taken from Mrs. James to eliminate her saliva as that present on the cloth strip (*Id.*). The absence of corroboration of the victim's testimony was emphasized through the inconclusive testimony concerning the bullet as well as the limited quantity of semen which could not be tested (JA 101). Then the identification of the gun was challenged and the absence of documentation of pur-

chase or testing of the weapon (JA 102). In counsel's words, "There was nothing. Nothing. Nothing. How can there be proof beyond a reasonable doubt if there is nothing." (*Id.*). On at least ten occasions the prosecution's case was characterized as "no evidence" or "nothing." (JA 95-103.) The jury was lastly reminded of the presumption of innocence, the Commonwealth's burden and that there was nothing to establish "guilt beyond a reasonable doubt" (JA 102-103).

The prosecutor in his closing argument similarly reviewed the elements of each offense and the evidence presented. On the May 1, 1981, burglary charge the evidence showed an absence of permission to enter, the bottom glass panel of a back storm door removed, and a pane broken out of the kitchen door so that entry could be gained. A latent print, with twenty-six positive points identifying petitioner, was found on the inside bottom portion of the glass storm door (JA 105). The prosecutor reviewed the victim's testimony that petitioner had only been in the front of her apartment on previous occasions and the improbability of a six-foot, eleven-inch person leaving a fingerprint on the lower portion of this door in some innocent fashion (JA 105). James' observations and inquiries when the windows were nailed shut between April 23, 1981, and May 1, 1981, were noted (JA 105-106). The prosecutor responded to defense counsel's repeated argument that there was no evidence other than the victim's testimony by noting that her testimony was repeatedly corroborated and not contradicted (JA 106). Her reporting of the April 23, 1981, burglary and providing the serial

number of the stolen gun was mentioned along with her immediate reporting of the May 1, 1981 burglary (*Id.*). He described the discovery of a small metal slug, introduced by the defense, in a position consistent with the victim's testimony of an accidental firing of the .22 caliber pistol. The prosecutor reminded the jury that the victim's stolen pistol was missing only one live round when it was taken from James that night and that James also had in his possession two cloth strips which matched the victim's previous description down to the knot in one strip (JA 107-108). He further noted the report of saliva from a Group A secreter on the cloth strip and that the victim was a Group A secreter (JA 108). In response to defense counsel's inquiry regarding a blood test of Mrs. James, he said that information was not available to the prosecution and that the defense had not provided the information (*Id.*). He continued by discussing the testimony of direct threats, the considerable disparity in size between the victim and the accused, and the documentation of semen on the victim and on James' towel in limited quantities (*Id.*). He noted the victim's prompt reporting of the rape to her supervisor, the supervisor's testimony concerning her conduct and her related fear of the threats and that this close neighbor might not be immediately apprehended, and her reporting the crime to the police soon thereafter (JA 109). Turning to the charge of receiving stolen property, the prosecutor noted the serial number of the gun in James' possession May 6, 1981, matched that on the victim's police report of April 24, 1981 (JA 110). The jury was reminded

that two police officers observed petitioner pick up the bag containing the gun and strips of cloth as he left the gym (*Id.*). The prosecutor concluded by reviewing the verdict form, arguing the seriousness of the offenses involved and recommending the jury ' fix what [they] believe to be a reasonable punishment." (JA 111).

Following the return of a guilty verdict on all three charges, the case was continued until January 27, 1982 for the persistent felony offender stage of trial (T. Red Vol., 38-39; Transcript of Record [hereinafter "R"] p. 53). At that time the jury was apprised of James' 1972 forgery conviction in Nebraska and his 1973 guilty plea to the charge of murder committed in Virginia for which he received a sentence of 28 years. (T. Vol. V, 9-13). Other elements of the persistent felony offender offense were established, including James' date of birth as March 1, 1953, and the fact that he was on active parole from the Virginia murder when he committed the present offenses (T. Vol. V, 20-21, 29.)

James took the stand in his own defense at the persistent felony offender stage and stated he thought his pleas in Nebraska involved only a misdemeanor charge and that he served no time in prison on that offense (T. Vol. V, 33-35). He testified he never was required to report to a probation officer because the University of Nebraska handled everything for him (T. Vol. V, 36, 40). James denied appearing in court for probation revocation and denied any knowledge of court documents reflecting confinement in jail until he could make arrangements to return to Virginia in July of

1972 (T. Vol. V, 31-42). He acknowledged returning to Virginia in July or August, 1972 and subsequently serving time in that state, but not on the forgery charge (T. Vol. V, 43, 45-46). James was found guilty as a first-degree persistent felon pursuant to KRS 532.080 and his sentence on the rape charge enhanced from twenty years to life (T. Vol. V, 45-47).

On direct appeal of his conviction to the Supreme Court of Kentucky as provided for under its rules, James acknowledged that trial counsel "requested an 'admonition' rather than a written instruction" but argued that the requested admonition is constitutionally mandated by this Court's decision in *Carter* v. *Kentucky,* 450 U. S. 288, 305 (1981).[3]

The Commonwealth of Kentucky responded on appeal that *Carter* entitles a defendant only to an instruction upon request and that Kentucky has long distinguished between admonitions and instructions and the purposes of each. Alternatively, the state argued that if there had been error, it was harmless. The Supreme Court of Kentucky held that no instruction had been requested and, in light of the difference between an admonition and an instruction, the request for an admonition had been properly denied (JA 114).

The petition for certiorari was granted October 17, 1983.

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[3]The state court arguments of petitioner and the Commonwealth of Kentucky are reproduced as an addendum herein for the convenience of the court.

SUMMARY OF ARGUMENT

In *Carter* v. *Kentucky* this Court held that the Fifth Amendment compels state trial courts to provide, upon request, a prophylactic jury instruction concerning a criminal defendant's failure to testify. Since opinion and practice vary widely among jurisdictions regarding the method of instructing a jury, implicit in this holding was that a *Carter* instruction would be provided in the same manner as all other jury instructions in that jurisdiction.

Kentucky promptly amended its Rules of Criminal Procedure to require that the *Carter* instruction be included with other written instructions upon request. Kentucky's interest in its requirement for written instructions includes full and accurate guidance to the jury; avoidance of misunderstanding or misconstruction of the law by jurors, counsel or the court; a clear understanding between the court and counsel as to the instructions requested and to be given; avoidance of error from hasty, extemporaneous charges to a jury, expedited trials and reduction in errors or retrials arising from disputes about the oral charge or frequent recharging on points not remembered or comprehended by all. Kentucky also historically and consistently has distinguished between "admonitions" defined as oral advice or caution by the court to the jury, and "instructions" which contain the controlling law of the case and must be given in writing absent clear and affirmative waiver on the record.

The Kentucky trial court correctly denied James' unexplained request for an isolated "admonition" on

his failure to testify since the full measure of the *Carter* protection was available to James, but not requested, and he has never asserted any interest or authority, other than *Carter*, to support his request for a form of relief not available or appropriate under long established practice and procedure. James' assertion that *Carter* compels relief in the form of any alleged functional equivalent of an instruction clouds the clear and final mandate of *Carter*.

State rules of procedure which encourage trial proceedings as free of error as possible and resolution of all issues at the time when society's resources are concentrated to decide the question of guilt or innocence make a major contribution to finality in criminal litigation. The Fifth Amendment does not require each state to employ what some consider to be better or wiser methods of practice and procedure. It compels only that, upon request, an instruction on a defendant's failure to testify be given in the same manner as all other instructions in that jurisdiction. The Supreme Court of Kentucky correctly interpreted *Carter* as so holding and its decision should be affirmed.

Even if this Court should determine that an admonition is constitutionally mandated, Kentucky submits that the denial of James' request was harmless error under the facts and circumstances of this case.

ARGUMENT

The Supreme Court of Kentucky Correctly Concluded That, While a No Inference Instruction Is Required To Be Given When Requested, Pursuant to *Carter* v. *Kentucky*, the Privilege Against Compulsory Self-Incrimination Does Not Mandate the Granting of an Unexplained Alternative Defense Request in the Form of an Admonition to the Jury Where Such a Request Conflicts With Established State Practice and Procedure.

A. *Carter* Mandates A Jury Instruction Upon Proper Request.

The Court in *Carter* v. *Kentucky*, 450 U. S. 288 (1981), carefully considered the Fifth Amendment privilege against self-incrimination and the unique value of jury instructions "to direct the jurors' attention to important legal concepts that must not be misunderstood, such as reasonable doubt and burden of proof." *Id.*, at 299. The Court noted:

> "We have repeatedly recognized that 'instructing a jury in the basic constitutional principles that govern the administration of criminal justice,' *Lakeside*, 435 U. S., at 342, is often necessary. Jurors are not experts on legal principles; to function effectively, and justly, they must be accurately instructed in the law."
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> "A trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirmative obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power

> of the jury instruction to reduce that speculation to a minimum." *Id.*, 450 U. S., at 302-303.

Thus, a new rule of constitutional law was created requiring that a prophylactic instruction be given when the defendant makes a timely and proper request.

We believe the *Carter* opinion, expressing a constitutional rule applicable to all states, was thoughtfully drafted so that the constitutional principle could be protected by all states without undue encroachment upon established trial procedures and a state's determination of the "best" method of educating the jury on the law of the case. This Court no doubt recognized the variation and experimentation among the states regarding jury instructions. By 1976 well over one-half of the states used pattern jury instructions and development of such instructions was in progress in other states.[4] Some authorities state these instructions are simply available for use while others presume errors from unnecessary modification of the pattern instructions.[5] State statutes and rules of practice differ on whether requested instructions must be submitted in writing.[6] Additionally, there is disparity of opinion as to the manner of delivering jury instructions. One judge discussed the dilemma as follows:

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[4]National Center for State Courts, Facets of The Jury System 30-31 (1976); NDAA, National Prosecution Standards, Appendix 17.8-1.

[5]American Bar Association, *Standards for Criminal Justice*, Trial By Jury, §15-3.6(b). (2nd Ed. 1980) Comments, pp. 15.104-105.

[6]*Id.*, §15-3.6(c) Comments.

> "Spontaneous oral delivery may accomplish understanding more readily but is fraught with the danger of reversal by the appellate court which considers the printed word out of its environment of the trial. A judge who instructs conversationally without a prepared script tends to ramble, to weaken his statements and to become obscure. Occasional use of conversational language maintains attention; its continued use is dangerous and not always convincing."[7]

The American Bar Association Commission on Standards of Judicial Administration determined that:

> "All jury instruction techniques necessarily involve accommodations among the sometimes conflicting objectives of technical accuracy, intelligibility to a lay audience, and the simplicity of procedural administration." ABA Standards, Trial Court §2.13, Comment p. 35.

Finally, courts differ on the benefits or prejudicial effect of sending written instructions with the jury for use during its deliberations in a criminal case. Compare *Copeland* v. *United States,* 152 F. 2d 769 (D.C. Cir. 1945), affirming trial court's denial of jury's request for written instructions when both counsel objected but seeing no reason the jury must be forced to rely on its recollections; *Manner* v. *Raskin,* 113 Ariz. 3, 545 P. 2d 927 (1976), noting mandatory practice of sending written instructions into the jury room in criminal trials; *Sanders* v. *State,* 264 Ind. 688, 348 N. E. 2d 642 (1976), where the trial judge was said to have contravened prevailing practice by permitting the

[7] R. McBride, *The Act of Instructing the Jury* (1969) at 191.

jury to take the final instructions to the jury room; and *Commonwealth* v. *Baker,* 466 Pa. 382, 353 A. 2d 406 (1976) in which the court said that by sending only the verdict form the jury might overemphasize the matters touched on in the writings and concluded the dangers inherent in this procedure outweighed the possible benefits.

The *Carter* opinion accommodated these diverse viewpoints and rules of practice by requiring only that an instruction, in whatever form or manner is utilized for other instructions in the jurisdiction, be given if requested.

Promptly after the *Carter* decision, Kentucky amended its Rule of Criminal Procedure [hereinafter "RCr"] 9.54, to add subsection (3). The rule in effect at the time of James' trial was as follows:

> "RULE 9.54 INSTRUCTIONS.
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> (1) It shall be the duty of the court to instruct the jury in writing on the law of the case. The instructions shall be read to the jury prior to the closing summations of counsel.
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> (2) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.
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> (3) The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall give an instruction to the effect that he is not compelled

> to testify and that the jury shall not draw any inference of guilt from his election not to testify and shall not allow it to prejudice him an any way.
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> [Amended effective March 1, 1974; September 1, 1981.]"

Kentucky has long required written jury instructions to be submitted to the jury when they begin deliberations. In *Allen* v. *Commonwealth,* 148 Ky. 327, 146 S. W. 762 (1912), one purpose of the requirement was explained as follows:

> "It is of the highest importance that the jury should be accurately and fully advised as to the law applicable to the case when they retire to their jury room to consider the verdict and determine the guilt or innocence of the accused by the application of the law as given by the court to the evidence as related by the witnesses. It was to prevent misunderstanding or misconstruction of the law that the Code provision was inserted, requiring instructions to be in writing. If the instructions are oral, the jurors may have different views as to what the court stated was the law of the case, and this, of course, might often result to the prejudice of the accused. But when the jury have before them in writing the law of the case, there is no room for misunderstanding or dispute as to what it is; and the probability that the accused will be prejudiced by error of the jury in understanding and applying the law is largely, if not altogether, removed." *Id.,* 146 S. W., at 763.

Additional interests served by a mandatory requirement for written instructions include: (1) compliance with the rule ensures that the jury will always have

before them, plainly written out, the rules of law they are to apply in a particular case, (2) juries, being untrained in the law and unfamiliar with its technical language, will almost of necessity have an indistinct recollection of the charge given them by the judge, (3) both the defendant and the state are entitled to a sound exposition of the law, (4) there should be no misunderstanding between the court and counsel as to the instructions requested and/or the instructions to be given, (5) written instructions prevent the evil of repeated retrials resulting from errors committed in hasty, extemporaneous charges to the jury, and (6) the trial of criminal cases is expedited by ending not only disputes among the jurors as to what the oral charge was but also the jurors' frequent return into court to be recharged on points not remembered or comprehended by all. See also: Comment, *The Jury Instruction Process—Apathy or Aggressive Reform?*, 49 Marq. L. Rev. 137, 139 (1965).

Kentucky's RCr 9.54 is consistent with related American Bar Association Standards,[8] except that no position was taken in the standard on whether all instructions should be in writing.[9] Kentucky's requirement is mandatory and the giving of oral instructions may constitute reversible error. *Bartram* v. *Commonwealth*, 233 Ky. 244, 25 S. W. 2d 378 (1930); *Gipson* v. *Commonwealth*, 251 Ky. 793, 66 S. W. 2d 16 (1933);

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[8]See: ABA Standards, Trial by Jury, §15-3.6; ABA Standards, Trial Courts, §2.13.

[9]ABA Standards, Trial by Jury, §15.3.6(e), Commentary, pp. 15.110-111.

Hounchell v. *Commonwealth*, 273 Ky. 172, 116 S. W. 2d 332 (1938). Kentucky law does provide for the giving of oral instructions upon request by the defense, but in a felony case "it must affirmatively and clearly appear that the accused consented to the jury's being instructed orally or that he waived his right to have them instructed in writing." Palmore, *Kentucky Instructions to Juries*, §1.51 (1975 Revision of Stanley), p. 21; See: *Hart* v. *Commonwealth*, 198 Ky. 844, 250 S. W. 108, 109 (1923) (reversing because the record was inadequate to show an affirmative waiver by the defendant.)

Consistent with the foregoing principles, Kentucky has long distinguished between the terms "admonition" and "instruction." Admonitions are given orally; instructions must be in writing absent clear waiver. Admonitions before and after recesses and other times while the trial is not in progress are designed to advise or caution jurors concerning their duty or conduct as jurors.[10] Admonitions during the course of trial are curative and for the purpose of removing from or limiting the jury's consideration of evidence improperly placed before them.[11] These admonitions are to be re-

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[10]See, for example, the admonition given just preceding the request at issue here:

"Ladies and gentlemen, I remind you once again of the admonition given before the recess and unless you indicate otherwise, I will assume that you have not discussed the case among yourselves nor allowed anyone to discuss it with you during the recess." (T. Red Vol., 3).

[11]See, for example, the ten admonitions cited by petitioner in the Appendix to his brief.

quested at the time the evidence is heard but may be given at the conclusion of that witness' testimony. See: *Bell* v. *Commonwealth,* Ky., 473 S. W. 2d 820, 821 (1971); *Brewer* v. *Commonwealth,* Ky. App., 632 S. W. 2d 456, 457 (1982). While perhaps other jurisdictions and certainly some writers may use the terms differently or interchangeably,[12] Kentucky clearly and consistently has required its practitioners to be mindful of the foregoing distinction.

As early as 1922, in *Miller* v. *Noell,* 193 Ky. 659, 237 S. W. 373 (1922), the highest court in Kentucky made it clear that there is a susbtantial difference between an "admonition" and an "instruction."

> ". . . [A]n 'admonition' is any authoritative oral communication or statement by way of advice or caution, made by the court to the jury during the trial of a case, respecting their duty or conduct as jurors, the admissibility or nonadmissibility of evidence offered by the parties, or the purpose, if competent only for a particular purpose, for which any of that admitted might or should be considered by them. But by the Civil Code of Practice and the courts of the state *the term 'instructions' has a wholly different legal meaning.* The instructions are from the court and

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[12]See *Wigmore on Evidence,* §13 (Tillers rev. 1983), p. 697. In discussing evidence admissible for a limited purpose, the author states:

"Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instructions of the court suffice for that purpose, and the better opinion is that the opponent of the evidence must ask for that instruction."

> addressed to the jury, and contain the law of the case by which they are to be guided and controlled in arriving at a verdict." *Id.* at 374. [Emphasis added].

Since *Miller,* the Kentucky courts have consistently and repeatedly adhered to the distinction between admonitions and instructions as the following cases illustrate. In *Brown* v. *Simpson,* 293 Ky. 277, 170 S. W. 2d 345 (1943), a civil action for damages for assault and battery, appellant complained that the trial court's admonition limiting the effect of reputation evidence was incomplete. Citing *Miller,* the appellate court noted the absence of any objection and declined to rule on the alleged error in the admonition. *Id.* at 347. The opinion continued:

> "This Miller case also disposes of Brown's contention that the admonition was an instruction and the court having given it sua sponte it was incumbent upon him to give it correctly, by pointing out that an 'admonition' is but an oral statement by way of advice made by the court to the jury during the trial respecting the purpose for which such evidence may be considered; while 'instructions' are always written, unless the parties agree otherwise, and contain the law of the case which guides the jury in reaching a verdict." *Id.*

Again, in *Evans* v. *Commonwealth,* 299 Ky. 273, 184 S. W. 2d 981, 985 (1945) the court said:

> "We therefore hold that an admonition, such as the court gave here relating to the weight to be given to the testimony of an accomplice, is not an

> instruction embraced within section 225,[13] *supra*, of the Criminal Code of Practice. . . ." [requiring instructions to be in writing.]

In *Weichhand* v. *Garlinger*, Ky., 447 S. W. 2d 606 (1969) the court held it error, but harmless error, to give an admonition that evidence of a criminal conviction was not conclusive on the question of negligence in a related civil action. In discussing the issue, the court again emphasized the distinction between requests for instructions and admonitions:

> "On the trial of the instant case evidence of the criminal conviction was admitted, over Garlinger's objections. He made no request, at the time of admission, for any *admonition*. However at the close of the trial he requested an *instruction* that the criminal conviction could be considered as evidence of negligence but was not conclusive. The trial court refused to give such an *instruction* but did give an *admonition* to that effect." *Id.* at 610. [Emphasis by the Court.]

In his pattern jury instruction text the former Chief Justice of the Supreme Court of Kentucky states:

> "Oral admonitions in reference to questions of evidence made during the progress of trial, not being on the merits of the prosecution or defense, are not instructions within the meaning of the criminal rule of procedure which requires all instructions to be in writing, or within the rule that the court must give the whole law of the case."

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[13]Criminal Code of Practice Sec. 225 was the precursor of RCr 9.54 in Kentucky.

Palmore, *Kentucky Instructions to Juries,* §1.31 (1975 Rev. of Stanley), p. 16.

The difference between an admonition and an instruction is further apparent in the following definitional sources:

"The word admonish means to caution or advise." *Guth* v. *People,* 402 Ill. 286, 83 N. E. 2d 590, 591 (1949); *People* v. *Pennington,* 267 Ill. 45, 107 N. E. 871, 872.

"Admonish. To caution or advise. To counsel against wrong practice, or to warn against danger of an offense." *Black's Law Dictionary,* 4th Ed. (1957), p. 69, and 5th Ed. (1979), p. 45.

"Instruction. Trial Practice. A direction given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; an exposition of the rules or principles of law applicable to the case or some branch or phase of it, which the jury are bound to accept and apply. The generally accepted meaning of the word instruction, when applied to courts, means a direction that is to be obeyed." *Black's Law Dictionary,* 4th Ed. (1957), p. 941; See also: 5th Ed. (1979), "jury instructions," p. 769.

Likewise, Kentucky courts have consistently held under RCr 9.54(2) that no claim of error regarding instructions may be raised on appeal unless the position urged was fairly and adequately presented to the trial

court by tendered instruction or by motion or by objection, stating specifically the grounds in support.[14]

Rather than follow these established procedures, petitioner failed to place on the record a clear and affirmative waiver of the written instruction requirement and further asked the court to risk reversible error by any or all of the following: (1) giving an "admonition" rather than an "instruction," (2) isolating one item from the law of the case and treating it in a substantially different manner from all others, or (3) granting the request even though counsel had not fairly and adequately presented his position by an offered written instruction or by motion or by making an objection which specifically stated his grounds.

To date petitioner has yet to cite any authority permitting partially oral and partially written instructions, any interest he has in such a request, or any manner in which he would have been prejudiced by entirely written or entirely oral instructions which would include a "no adverse inference instruction." Nor has he cited any Kentucky authority which would bring his request within the recognized definition of admonition. It must be noted that counsel did not refer to the court's written instructions as admonitions in

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[14]See, for example: *Sampson* v. *Commonwealth*, Ky., 609 S. W. 2d 355, 360 (1980); *Wilson* v. *Commonwealth*, Ky., 601 S. W. 2d 280, 285 (1980); *Nickell* v. *Commonwealth*, Ky., 565 S. W. 2d 145, 148 (1978); *Long* v. *Commonwealth*, Ky., 559 S. W. 2d 482, 484-485 (1977); *Eversole* v. *Commonwealth*, Ky., 550 S. W. 2d 513, 515-516 (1977); *Hunt* v. *Commonwealth*, Ky., 466 S. W. 2d 957, 959 (1971); *McCranney* v. *Commonwealth*, Ky., 449 S. W. 2d 914, 915 (1970).

his previous breath (JA 95). He correctly referred to them as "instructions." Yet he plainly chose the term "admonition" seconds later when he stated his request for relief. (*Id.*)

The Commonwealth of Kentucky has never regarded this case as simply a question of semantics or some word game. Rather, the issue is the scope of the Fifth Amendment protection associated with a possible adverse inference arising from a defendant's failure to testify. This Court in *Carter* established a clear preventive rule to be applied in all jurisdictions. The decision in *Carter* was not the beginning of inquiry on this subject but, rather, we believe it was designed to be the end, save the question of harmless error.

Bruno v. *United States,* 308 U. S. 287 (1939), interpreted the legislative intent of 18 U.S.C. §3481 as "an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts" and held that the substance of the requested instruction should have been granted. *Id.,* 308 U. S. at 293, 294. In *Griffin* v. *California,* 380 U. S. 609 (1965) the Court considered a California constitutional provision stating in part:

> ". . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." California Constitution, Article I, §13; *Id.,* 380 U. S., at 610, note 2.

Such a rule, permitting repeated prosecutor comments explicitly referring to the defendant's failure to take the stand and the trial court's acquiescence therein, constituted a solemnization of "the silence of the accused into evidence against him. . . ." *Id.*, 380 U. S., at 614. This Court held:

> ". . . That the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.*, 380 U. S., at 615.

The question whether an accused could require a jury instruction that his silence must be disregarded was expressly reserved. *Id.*, 380 U. S., at 615, note 6. The issue of the Fifth Amendment and jury instructions was considered again in *Lakeside* v. *Oregon*, 435 U. S. 333 (1978), wherein a "no adverse inference" instruction was given over the defendant's objections. The Lakeside Court concluded:

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each state is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments." *Id.*, 435 U. S., at 340-341.

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> "Yet the petitioner argues that his constitutional right to counsel means that this instruction could constitutionally be given only if his lawyer did not object to it. We cannot accept the proposition that

> the right to counsel, precious though it be, can operate to prevent a court from instructing a jury in the basic constitutional principles that govern the administration of criminal justice." *Id.*, 435 U. S. at 342.

The remaining question, reserved in *Griffin, supra,* was resolved in *Carter* v. *Kentucky* when the court announced a per se rule, that upon proper request, a defendant has a right to a prophylactic instruction under the Fifth and Fourteenth Amendments.

Petitioner here urges this Court to make the plain rule of *Carter* the beginning of another round of litigation rather than the resolution of the issue. The unanswered questions would include: In what "form" must the instruction be given? When must it be given? If requested, must it be given more than once or in both an oral and written manner? If an admonition is the "functional equivalent" of an instruction, what other "functional equivalents" might there be? When has a defendant substantially complied with the requirement of a "request"? How is a trial judge to know, in the heat of trial, that when defense counsel says one thing he really means something else?

At least one Court has already considered an admonition given during jury selection and held:

> "But such preliminary admonition is no substitute for the required instruction which must be given with others as the jury prepares to deliberate." *United States* v. *Patterson*, 648 F. 2d 625, 631 (9th Cir. 1981).

In a Fourth Amendment context it was said:

> "Our entire profession is trained to attack 'bright lines' the way hounds attack foxes. Acceptance by Courts of arguments that one thing is the 'functional equivalent' of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern." *Robbins* v. *California,* 453 U. S. 420, at 443 (1981). (Rehnquist dissenting).

In the present case Kentucky fully complied with the mandate of *Carter* by providing an automatic right, upon proper request, to a "no adverse inference" instruction to be given in the same manner as all other instructions. RCr 9.54(3). The Supreme Court of Kentucky recognized James' right to such an instruction but affirmed the trial court's denial of his alternative request.

> "James requested that the trial court give an 'admonition' to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an 'instruction' on failure of a defendant to testify. *Carter* v. *Kentucky,* 450 U. S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court

properly denied the request for an admonition." *James* v. *Commonwealth,* Ky., 647 S. W. 2d 794, 795-796 (1983).

Petitioner urges this Court to hold that the privilege against compulsory self-incrimination compels state courts to grant a request not only for an "instruction" but also for an admonition or other alternative relief regardless of the impact upon established state practice and procedure. He argues the decision of the Supreme Court of Kentucky on procedural grounds:

> ". . . represents an obvious attempt by that court to circumvent the mandate of this court in *Carter* v. *Kentucky* and deprives petitioner of the benefit of judicial guidance as to the jurors' understanding of the privilege against compulsory self-incrimination."

In *Wolfe* v. *North Carolina,* 364 U. S. 177 (1960), the Court considered a similar allegation, that the Supreme Court of North Carolina's decision not to consider a claim of racial discrimination due to the petitioner's procedural failure to complete the trial record, was untenable and inadequate in light of the constitutional right involved. That claim was rejected as follows:

> "Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellant an opportunity to present their federal claim. . . . Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts. The mode and

> time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.' [Citations omitted.] '[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.' " *Id.*, at 194-195.

The North Carolina Supreme Court did not decide the federal question raised "because of the requirement of rules of state procedural law within the constitutional power of the states to define, and here clearly delineated and evenhandedly applied." *Id.*, at 196. Similarly, the Kentucky Supreme Court declined to decide whether there was constitutional error in the failure to give an instruction on the right not to testify because no such instruction was requested and petitioner failed to follow the requirements of state procedural law.

Subsequently this Court, on review of a habeas corpus claim, declined to consider whether a confession was improperly admitted into evidence at a state trial. *Wainright* v. *Sykes*, 433 U. S. 72 (1977).

> "We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondent's confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an

> independent and adequate state procedural ground which would have prevented direct review here." *Id.*, 433 U. S., at 87-88.

In rejecting the "sweeping language of *Fay* v. *Noia*," 372 U. S. 391 (1963), which required a "knowing and deliberate waiver of the federal constitutional contention," the Court emphasized the "major contribution to finality in criminal litigation" fostered by a contemporaneous objection rule. *Id.*, 433 U.S., at 87-88.

> "The failure of the federal habeas corpus courts generally to require compliance with a contemporaneous objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding; the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the questions of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.
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> We believe the adoption of the Francis rule in this situation will have the salutary effect of making

> the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.*, 433 U. S., at 90.

In a similar manner, state decisions that written instructions accurately apprise the jury of the law of the case and prevent unnecessary delays or retrials and requirements that requests for instructions be made in conformity with established practice or that, at least, the grounds for a nonconforming request be made clear to the trial judge, serve the salutary purpose of encouraging final resolution of all issues at the state trial on the merits.

James relies on the case of *Henry* v. *Mississippi*, 379 U. S. 443 (1965), which the Court remanded for consideration of the possible issue of waiver. James' reliance on *Henry* for the proposition that compliance with procedural rules may be unnecessary appears misplaced in light of the *Wainwright* court's explanation of the holding as follows:

> "In Henry v. Mississippi, 379 U. S. at 451, the Court stated that decisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby forgone, except where 'the circumstances are exceptional'." *Wainwright, supra,* 433 U. S. 72, at 91, note 14.

Petitioner has not urged any exceptional circumstances here.

Kentucky submits that the present case bears a stronger resemblance to the due process challenge of

the unitary habitual offender proceeding in *Spencer* v. *Texas*, 385 U. S. 554 (1967) where this Court said:

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. [Citations omitted.] But it has never been thought that such cases establish this Court as a rule-making organ of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. . . . As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' Snyder v. Massachusetts, 391 U. S. 97, 105." *Id.*, 385 U. S., at 563-564.

This Court explained that determination of the "best" procedure requires consideration of a wide variety of criteria including adequacy of notice and an opportunity to challenge evidence, the allocation in a particular jurisdiction of responsibility between the court and jury, the method best accommodated to the State's established trial procedures, and which method is apt to be the least prejudicial. *Id.*, 385 U. S. 567. "Tolerance for a spectrum of state procedures" was deemed to be especially appropriate. *Id.*, 385 U. S. at 566. See also: *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Williams* v. *Florida*, 399 U. S. 78 (1970), considering state practices relating to jury size and unanimity.

In the case at bar, Kentucky in no way denigrated the privilege against compulsory self-incrimination by requiring that the constitutionally required instruction be given in some manner different from other instructions on the law of the case. James, however, urges this Court to hold that the decision in *Carter* gives rise not only to an instruction in conformity with state procedure but also to entitlement to any "practical substitute" requested by defense counsel, whether or not accommodated by established trial procedure. In other words, the Fifth Amendment privilege is not simply equal to all other constitutional rights but is superior and deserves extraordinary treatment when requested.

Among other problems presented by this approach is the determination of what is or is not a practical substitute for an instruction to the jury. When the constitutionally-rooted mandate of *Carter* is confined to an instruction to the jury upon request, there is no doubt. In each state, in every jurisdiction, the providing of a jury instruction can be uniform and without equivocation. Expanding the constitutional mandate in *Carter* to a court being required to recognize and carry out what any given defense counsel may believe to be a "functional equivalent" or practical substitute for a jury instruction precipitates disagreements and misunderstandings of defense tactics by trial judges, state appellate courts and federal habeas courts. The consequence is extended litigation based on hindsight or speculation. Surely, such is not the mandate of *Carter*. Again, Kentucky has accepted this

Court's prophylactic constitutional rule as enunciated in *Carter*. The constant dripping of water on a rock over a period of time will eventually erode away the rock. What James is asking this Court to do is to let the dripping begin. If this is permitted, in time there will be no certainty as to what a court must do at the request of a defendant regarding the no-inference rule rooted in the Fifth Amendment, but rather the court's decision, if the request is not granted, will always be subject to review as to whether the requested action is the "functional equivalent" of an instruction.

Kentucky urges this Court to hold that the language of *Carter* means what it says. Upon request, a criminal defendant is entitled to a jury instruction that there be no adverse inference from his failure to testify. The Supreme Court of Kentucky correctly interpreted the *Carter* opinion as so holding. Its decision should be affirmed.

B. Even If It Is Determined That An Admonition Was Constitutionally Required, Denial Of The Requested Admonition, Under The Facts Of This Case, Was Harmless Error.

Should this Court decide that a criminal defendant is entitled, upon request, to an admonition or to some other practical substitute concerning his failure to testify, Kentucky submits that the error in denying James' request was harmless error under the totality of the circumstances.

In *Chapman* v. *California*, 386 U. S. 18 (1967), this Court clarified that federal, rather than state law, applies to any determination of what constitutes harm-

less error when the error involves denial of a federal constitutional right. While this Court emphasized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error" (386 U. S. at 23), it appears this Court did not believe that references by the court and prosecutor to the defendants' failure to testify were in that category. Instead, this Court applied the standard articulated in *Fahy* v. *Connecticut,* 375 U. S. 85 (1963), and held reversal is inappropriate when the comments did not contribute to the verdict.[15] *Chapman, supra,* 386 U. S., at 24.

Subsequent to *Chapman,* this Court has consistently refused to reverse state and federal convictions for constitutional errors which it deemed harmless. See, *e.g., Chambers* v. *Maroney,* 399 U. S. 42, 52-53 (1970) (Fourth Amendment); *Brown* v. *United States,* 411 U. S. 223, 231-232 (1973) (Sixth Amendment); *Milton* v. *Wainwright,* 407 U. S. 371 (1972) (same); *Schneble* v. *Florida,* 405 U. S. 427, 432 (1972) (same); *Harrington* v. *California,* 395 U. S. 250 (1969) (same). In other cases where it has found errors of a constitutional magnitude, the Court has often remanded the case for a determination of whether the error was harmless. See, *e.g., Moore* v. *Illinois,* 434 U. S. 220, 232 (1977) (Sixth Amendment); *Coleman* v. *Alabama,* 399 U. S. 1, 11 (1970) (same); *United States* v. *Wade,* 388 U. S. 218, 242 (1967) (same).

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[15]Under the facts of *Chapman* this Court concluded the error of repeated and direct references to the defendants' silence, coupled with sufficiently inconclusive evidence, was not harmless.

Last term, this Court reiterated its affirmative rejection of a per se rule requiring automatic reversal in cases involving violations of *Griffin* v. *California,* 380 U. S. 609 (1965), *i.e.,* prosecutorial comment on a defendant's failure to testify. *United States* v. *Hasting,* 461 U. S. ——, ——, 103 S. Ct. 1974, 1980 (1983).

> "Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, see, e.g., Brown [v. United States, 411 U. S. 223, 230-232 (1973)]; Harrington v. California, 395 U. S. 250 (1969); Milton v. Wainwright, 407 U. S. 371 (1972)." *Id.,* 461 U. S., at ——, 103 S. Ct., at 1980.

The test to be applied in such cases was stated as follows:

> "The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" *Id.,* 461 U. S., at ——, 103 S. Ct., at 1981.

While the question of whether it can be harmless error to refuse to give a requested no-inference instruction was expressly left open in *Carter,* since the argument was not raised in state court, several state courts subsequently have recognized their duty to determine whether *Carter* violations are harmless. Applying the *Chapman* standard in *Richardson* v. *State,* Miss., 402 So. 2d 848 (1981), the Court affirmed the conviction

after noting identification of the defendant as the burglar and his guilt of the crime were proved by overwhelming evidence. In *Franklin* v. *State,* Nev., 646 P. 2d 543 (1982), the Court said, in affirming the conviction:

> "We have already noted the analogous relationship between the *Griffin* and *Carter* holdings; we can see no justification for applying a different standard of review to the rule announced in *Carter.* We join several other jurisdictions which have determined that *Carter* did not abrogate the *Chapman* test: The error is not reversible if the Court determines that it was harmless beyond a reasonable doubt."

In *Parker* v. *State,* Ind., 425 N. E. 2d 628 (1981), the court recognized the applicability of the harmless error rule to *Carter* violations, although the case was decided on the ground that the instruction was not requested. Most recently, the Supreme Court of Kentucky held that the refusal to give a *Carter* instruction was harmless error where the evidence supporting a charge of receiving stolen property included notice to the defendant that the guns were stolen, storage of the guns near the defendant's home and evidence of his distribution of the guns with warnings that the recipients should get rid of them. *Commonwealth* v. *McIntosh,* Ky., 646 S. W. 2d 43 (1983).[16]

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[16]Compare: *People* v. *Crawford,* Colo. App., 632 P. 2d 626 (1981); *Mosley* v. *State,* Fla. App., 402 So. 2d 559 (1981); *Brown* v. *State,* Tex. Cr. App., 617 S. W. 2d 234 (1981), in which neither harmless error nor the facts were discussed and an automatic reversal rule apparently imposed.

In the present case, the question of harmless error was plainly presented to the Supreme Court of Kentucky (see: Addendum, Brief for Appellee) but that court felt it unnecessary to address the issue due to James' failure to request an instruction. As in *Hasting,* this Court has before it the same record reviewed by the Supreme Court of Kentucky and is "in precisely the same position of that Court in addressing the issue of harmless error." 461 U. S. at ——, note 8.

We believe that, absent the denial of the requested admonition, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

At trial the victim unequivocally identified her May 6, 1981, attacker as Mike James, a neighbor whom she knew only by his first name (JA 32, 63, 71). From her report and other available information, the police were able to identify petitioner and to apprehend him at a basketball game later that evening. (JA 55, 71-72). James was observed picking up a gym bag from the bleachers as he prepared to leave the gymnasium before he was apprehended at the exit (JA 55, 62). The bag contained a .22 caliber pistol with the same serial number as the gun the victim reported stolen from her apartment on April 23, 1981 (JA 57-58). It also contained two cloth strips matching the victim's description of the items used to bind and gag her (JA 58). Saliva from a person with the same blood type as the victim's was found in the knot of the cloth strip described as that used for a gag (JA 36, 58, 77-78). A metal slug was found in the victim's front room in a position consistent with her description of James' acci-

dental firing of the pistol, and the gun in his possession that evening was missing only one live round (JA 59, 73, 76). Following the May 6 hospital examination of the victim, laboratory reports revealed semen in the vaginal swabs, vaginal smear, a tampon, and her panties (JA 54, 79). On the inside lower portion of a storm door panel discarded during the May 1, 1981, burglary of the victim's apartment, the police found a fingerprint which was conclusively established as James' print (JA 51-52, 76-77).

The defense presented testimony that James was seen alone May 6 leaving his apartment at a time inconsistent with the victim's testimony of the facts (JA 85-88). There was a strong inference, however that Mr. Bates might have been mistaken about the date since he observed James' coming and going regularly or that he might have forgotten the exact date during the months between the rape, the first contact by defense counsel, and the trial (JA 88-91). Bates' testimony that he did not see James or the victim enter or leave James' apartment was not inconsistent with other testimony concerning the time Bates was in the basement, the time he remained in the yard, and the victim's testimony that James made sure they were not seen (JA 85-93, 33-34).

In short, the direct and circumstantial evidence of James' guilt was overwhelming. Under the totality of the evidence and the whole record of the case, it must be said beyond a reasonable doubt that the error relied upon was harmless.

CONCLUSION

The privilege against compulsory self-incrimination does not require an admonition, in lieu of an instruction, on the defendant's failure to testify. Even if an admonition is constitutionally required, under the facts of this case the denial of the requested admonition was harmless error.

Respectfully submitted,

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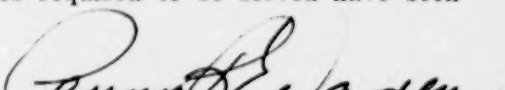
CERTIFICATE OF SERVICE

I, Penny R. Warren, counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by personally mailing three copies of the same to counsel for the petitioner, Hon. C. Thomas Hectus, GITTLEMAN & BARBER, 635 West Main Street, Louisville, Kentucky 40202, this 30th day of December, 1983. I further certify that all parties required to be served have been served.



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ADDENDUM

SUPREME COURT OF KENTUCKY

File No. 82-SC-394-MR

MICHAEL P. JAMES, - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

BRIEF FOR APPELLANT

ARGUMENT IV

Appellant's Convictions of the Principal Offenses Were Obtained in Violation of Due Process of Law Where the Trial Court Refused to Admonish the Jury Regarding Appellant's Right to Not Testify.

Appellant, by his counsel, requested prior to the instruction of the jury that "an admonition be given to the jury that no emphasis be given to the defendant's failure to testify . . ." [T.E. (Red Volume) p. 4]. Appellant submits that the failure to do so deprived him of due process of law.

The law in this Commonwealth has apparently been to the effect that no comment (even one protective in nature) could be made on defendant's failure to testify. *Green* v. *Commonwealth*, Ky., 488 S. W. 2d 339 (1972), interpreting KRS 421.225; but see *Spencer* v. *Commonwealth*, Ky., 467 S. W. 2d 128 at 130-131 (1971) and *Kelley* v. *Commonwealth*, 300 Ky. 136, 187 S. W. 2d 796, 800 (1945) (holding that the defendant was entitled to instruction upon request; the language in *Spencer* was rejected in *Green, supra,* as "dicta").

However, appellant submits that the requested "admonition"[3] in this case is now constitutonally mandated.

In *Carter* v. *Kentucky*, ____ U. S. ____, 101 S. Ct. 1112, ____ L. Ed. 2d ____ (1981), the United States Supreme Court reviewed a decision of this Court affirming Carter's conviction despite the refusal of the trial court to instruct the jury on Carter's failure to testify. The U. S. Supreme Court reversed, stating that

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. [cite omitted]. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. [cite omitted]. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [cite omitted], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury

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[3]Appellant's trial counsel apparently requested an "admonition" rather than a written instruction. Nonetheless, the constitutional underpinnings are the same, at least in the sense that an admonition is "any authoritative oral communication or statement by way of advice or caution by the court to the jury respecting their duty or conduct as jurors . . . ." Black's Law Dictionary, Revised Fourth Edition, p. 69 (1968) citing *Miller* v. *Noell*, 193 Ky. 659, 237 S. W. 373, 374.

> will give evidentiary weight to a defendant's failure to testify.
>
> [*Id.*, 101 S. Ct. at 1121-1122].

It cannot be assumed that the jury did not notice the appellant's failure to testify, and therefore drew no adverse inference therefrom. The U. S. Supreme Court has labeled such an assumption as "very doubtful . . . speculative . . . [and] dubious. . . ." *Lakeside* v. *Oregon*, 435 U. S. 333, 98 S. Ct. 1091, 55 L. Ed 2d 319 (1978).

Because the trial court refused appellant's timely request for an admonition on his right to not testify, this Court should reverse his conviction and grant him a new trial.

SUPREME COURT OF KENTUCKY

File No. 82-SC-394-MR

MICHAEL P. JAMES, - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

BRIEF FOR APPELLEE

ARGUMENT IV

The Trial Court Properly Declined to Give an Admonition Regarding Appellant's Right Not to Testify.

Acknowledging that no *instruction* was requested, appellant relies on *Carter* v. *Kentucky*, 450 U. S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), for the proposition that the trial court was required, upon request, to give an *admonition* "that no emphasis be given to the defendant's failure to testify" (TE 426). The Commonwealth respectfully disagrees with appellant's attempt to equate instructions and admonitions and submits that *Carter* is not supportive of appellant's position.

As the Court made clear in *Miller* v. *Noell*, 193 Ky. 659, 237 S. W. 373 (1922), there is a substantial difference between an admonition and an instruction.

> . . . [A]n 'admonition' is any authoritative oral communication or statement by way of advice or caution, made by the court to the jury during the trial of a case, respecting their duty or conduct as jurors, the admissibility or nonadmissibility of evidence offered by the parties, or the purpose, if competent only for a particular purpose, for which any of that admitted

> might or should be considered by them. But by the Civil Code of Practice and the courts of the state *the term 'instructions' has a wholly different legal meaning.* The instructions are from the court and addressed to the jury, and contain the law of the case by which they are to be guided and controlled in arriving at a verdict." *Id.* at 374. (Emphasis added.)

Similarly, in *Carter, supra,* the Court noted " 'the very purpose' of a jury instruction is to direct the jurors' attention to important legal concepts . . ." *Id.*, 450 U. S. at 299. Later in the same Opinion the Court said:

> "No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, *if requested to do so, use the unique power of the jury instruction* to reduce that speculation to a minimum." *Id.*, 450 U. S. at 303. (Emphasis added.)

If appellant had requested the instruction, the court would have been obligated to give a proper instruction. However, appellant may not predicate reversible error on a request for an admonition which was correctly denied by the court.

Should this Court decide the trial judge was nonetheless obligated to instruct the jury that no inference shall be drawn from the defendant's election not to testify, the Commonwealth submits that any error was harmless beyond a reasonable doubt. In *Carter* the Court explicitly left open the issue of whether the failure to give the requested instruction would be harmless under the standard established in *Chapman* v. *California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1976). Subsequently, two other states which have considered the issue have found the error harmless. *Richardson* v. *State,* Miss., 402 So. 2d 848, 851-852 (1981); *Parker* v. *Indiana,* Ind., 425 N. E. 2d 628, 630 (1981).

The record in the present case reveals both the prosecutor and defense attorney discussed during voir dire that a defendant is presumed innocent until proven guilty beyond a reasonable doubt and that the burden of proof is on the Commonwealth (TE 143, 165-166). The defense attorney also inquired whether the defendant's failure to testify would create any inference as to innocence or guilt or would cause them to form a decision (TE 167-168). Unlike *Carter, supra,* the prosecutor in his closing comments did not repeatedly argue that the Commonwealth's evidence was "not controverted" or that the defendant's explanation for his conduct was "not in the record." *Id.,* 450 U. S. at 294.

Additionally, the evidence of appellant's guilt was overwhelming. He was positively identified as the perpetrator of the rape. Examination of the victim revealed semen in the vagina, and appellant that night had in his possession two strips of cloth like those used to bind and gag the victim. One strip was knotted and contained saliva of the same blood group as the victim's. Appellant also had in his possession the pistol recently stolen from beneath the victim's pillows. His fingerprint was found on the inside of the storm door bottom panel the day it was forcibly removed and the victim's pillows again disturbed. While appellant did receive the maximum sentence, he may not attribute the severity of his punishment to the failure to give an instruction on his right not to testify. Appellant took the stand in the second phase of the bifurcated proceeding, yet there he also received the maximum sentence. The Commonwealth submits that upon the whole case there is not "a substantial possibility that the result would have been any different." *Abernathy* v. *Commonwealth,* Ky., 439 S. W. 2d 949, 952 (1969). If there were any error, it is harmless beyond a reasonable doubt.